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73-796

No.

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

DERL GRAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

DERL GRAY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1973 (App. B, *infra*). A petition for rehearing was denied on September 18, 1973 (App. C, *infra*). On October 9, 1973, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to November 17, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the rationale of *Terry* v. *Ohio*, permitting limited detention, questioning, and search of the person on less than probable cause, applies to a brief handling and inspection of property observed during the course of a lawful search, or whether such action, however reasonable and limited in its intrusiveness, is subject to the warrant and probable cause requirements of the Fourth Amendment.

2. Whether, assuming the actions of the police officers did not satisfy the requirements of the Fourth Amendment, the nature of the violation was nevertheless such as not to require application of the exclusionary rule.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Kentucky, respondent was convicted on two counts of violations of federal firearms laws, 18 U.S.C. 922(h)(1) and 922(j). He was sentenced to concurrent three year terms of imprisonment. The court of appeals reversed (App. A, *infra*, 8A) on the ground that evidence resulting from what it held to be an unlawful search and seizure was improperly admitted.

The evidence adduced at the pretrial hearing on respondent's motion to suppress and at trial showed that during the early part of July, 1972, Kentucky State Trooper John Miller received a complaint that respondent, owner of a small grocery store, was selling beer without a license (Tr. 52–53). Miller, a well-known resident of the local community, requested

Trooper Edward Brodt to attempt to purchase beer from respondent (Tr. 52). On July 16, 1972, Trooper Brodt went to respondent's store and purchased several cans of beer (Tr. 14–15, 31). A state warrant was then obtained for respondent's arrest, together with a warrant to search the premises for intoxicating liquors (Tr. 32); Troopers Miller and Brodt returned to the store to arrest respondent and execute the search warrant (Tr. 33).[1]

Miller, a law enforcement officer with over twenty-five years experience, testified that, prior to the search, he had placed respondent under arrest and advised him of his rights (Tr. 152–155). The search of the first floor of the premises, which was maintained as a grocery store, disclosed a small quantity of beer (Tr. 34). Brodt then proceeded to the second floor residence area, while Miller remained downstairs with respondent (Tr. 34, 51, 156). Although Brodt's search revealed no alcoholic beverages, he found two high-powered rifles in a clothes closet (Tr. 34, 137, 138–139). The officer removed the weapons from the closet and returned downstairs (Tr. 35, 139).

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[1] The focus at the suppression hearing was on alleged technical defects in the affidavit supporting the warrant under which the search of respondent's building was undertaken and the claim that the warrant limited the search solely to the downstairs area of the premises (Tr. 60–68). The question of the propriety of the police officers' actions in inspecting the rifles and copying their serial numbers was initially raised during oral argument in the court of appeals. That court concluded that the officers' search was pursuant to a legitimate warrant, but that the inspection of the guns was improper (App. A, *infra*, 6A).

When respondent was asked if the rifles belonged to him, he replied affirmatively, stating that he had purchased them from two men for $75.00, a tank of gas, and some food. Respondent was unable to identify the men who sold him the rifles, although he stated that he believed they were from Ohio and had been driving a grey Chevrolet (Tr. 149–150, 158–159). Based on his prior experience, Miller was not satisfied with respondent's explanation (Tr. 164). He examined the weapons and copied down their serial numbers (Tr. 156). The two guns were then returned to the upstairs closet (Tr. 35). Following the search, the troopers departed with respondent.[2]

The troopers then processed the serial numbers of the rifles through the computer of the National Crime Information Center and were advised that the weapons had been stolen in Tennessee on June 11, 1972 (Tr. 158). Brodt executed a second affidavit to obtain a warrant to seize the rifles and a warrant for respondent's arrest for receipt of stolen property.[3] The officers returned to respondent's store and placed him under arrest; they were unable, however, to locate the weapons (Tr. 54). After the troopers indicated that they would also arrest respondent's common law wife on the state charges, he took the officers to two

[2] Respondent was promptly released on bail.

[3] The Fayette County Quarterly Court found both search warrants invalid, for reasons not evident in the record, and dismissed the charge relating to receipt of stolen property. However, respondent was convicted of having sold alcoholic beverages without a license. As the court below noted, the state court ruling on the warrants is not binding upon federal courts in determining the legitimacy of the search. See *Elkins* v. *United States*, 364 U.S. 206, 223–224.

locations in Lexington, Kentucky and retrieved the rifles (Tr. 27, 36–37, 54). The firearms seized from respondent were admitted into evidence at trial and formed the basis for his conviction.

At trial, respondent testified that he had purchased the rifles from his wife's sister (Tr. 195–197). He further testified that although he did not know that the rifles had been stolen, he had lied to the state policemen about how he obtained them in order to protect his wife's family (Tr. 199–201, 202–204).

The court of appeals reversed. Making no distinction between the brief inspection and recordation of serial numbers that took place here and a full blown seizure entailing the taking of property into police custody, the court analyzed the case as though governed by the warrant requirement of the Fourth Amendment. It held that the initial examination of the weapons could not be justified under the "plain view" exception to the warrant requirement, because of the absence of a basis for believing that they were contraband or evidence of a crime. Thus, while Trooper Brodt was lawfully entitled to see the rifles, the court found he had no lawful basis for inspecting them and "seizing" their serial numbers. The court concluded that since this examination led the law enforcement officers to the discovery that the rifles were stolen, the second warrant was tainted and the firearms were improperly admitted into evidence.

REASONS FOR GRANTING THE WRIT

The holding of the court below—that the Fourth Amendment forbids a police officer from inspecting a

firearm and recording its serial number in the course of an otherwise lawful search—raises a constitutional question of substantial practical importance for law enforcement. The decision below reflects a rigid and formalistic approach to "searches" of property not applied to detentions, interrogations, and searches of the person. It ignores the important distinction between the very limited intrusion involved in the present case and a full-dress seizure in which property is placed in extended police custody and its owner deprived of possession, treating both circumstances as governed by identical warrant and probable cause requirements.[4] If generally applied and followed, this ruling would needlessly limit police officers in the conduct of their legitimate duties, without significantly advancing the values with which the Fourth Amendment is concerned. Given the circumstances under which the weapons were examined, their suppression constituted an unjustifiable application of the exclusionary rule.

1. The guiding standard of the Fourth Amendment is reasonableness. In interpreting this standard, this Court has recognized that not all interferences with a person's liberty and privacy are necessarily of such a magnitude as to require probable cause or a warrant.

[4] We concede that, on the basis of the record made in the lower courts, the officers did not have probable cause when they first saw the rifles to believe that the rifles were evidence of a crime. Accordingly, they could not have procured a warrant for their seizure. This fact highlights the irrelevance of much of the analysis in the opinion of the court of appeals, which is addressed to the warrant requirement and its exceptions, without examining the fundamental underlying question of whether the warrant requirement is applicable to this conduct at all.

See, *e.g.*, *Cady* v. *Dombrowski*, No. 72–586, decided June 21, 1973; *Terry* v. *Ohio*, 392 U.S. 1. As this Court observed in *Terry*, in holding that a police officer making a reasonable investigatory stop may conduct a limited protective search for concealed weapons (*id.* at 27):

> Petitioner's reliance on cases which have worked out standards of reasonableness with regard to "seizures" constituting arrests and searches incident thereto is thus misplaced. It assumes that the interests sought to be vindicated and the invasions of personal security may be equated in the two cases, and thereby ignores a vital aspect of the analysis of the reasonableness of particular types of conduct under the Fourth Amendment. * * *

A similar theme was sounded in *Adams* v. *Williams*, 407 U.S. 143, 145–146:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. [Citations omitted.]

The fundamental thrust of these decisions is to recognize that the Fourth Amendment's "reasonableness" requirement inherently entails a balancing of

the extent of the intrusiveness of police action, on the one hand, and the degree of justification required to support it, on the other. Therefore, just as probable cause to arrest is not necessary to support a limited detention and questioning of the person, so the warrant requirement is not applicable to every limited handling or inspection of objects.

In the instant case, the law enforcement officers adopted an entirely appropriate "intermediate response." They were faced with a suspected law breaker in possession of two deadly weapons, who did not, in the opinion of a veteran officer, give a convincing explanation for his acquisition of them. In these circumstances, the conduct of the officers in inspecting the weapons and seeking further information to determine the lawfulness of their possession was eminently reasonable.[5] Contrary to the technical holding of the court below, the brief handling of the weapons cannot be equated with a "seizure"—an actual taking of the weapons into police custody. Here, Trooper Miller simply wrote down the serial numbers of the weapons and then replaced them where they had been found.

The police officers had lawfully entered respondent's premises and had inadvertently come upon the

[5] Indeed, if the troopers were aware of respondent's conviction of a felony a year earlier (Tr. 167–168), his explanation indicated that he had violated 18 U.S.C. 922(h)(1) by receiving guns which had been transported in interstate commerce. Failure to investigate further would have been poor police work. We note that, because the issue regarding the propriety of the initial handling of the weapons was not raised in the district court, there was no occasion to explore the factors which prompted the inspection of the rifles.

weapons during the course of a lawful search. Their right to see the rifles was unquestioned; what the court of appeals disapproved was, in essence, that the inspection was manual as well as visual. This inspection constituted the most minimal intrusion into respondent's privacy, if there was any intrusion at all into that privacy.[6] And whatever the extent of the intrusion, it was clearly proper, considering the requirements of adequate law enforcement.

Even if the court below were correct in concluding that the limited inspection and copying of the serial numbers was a "seizure" of those numbers,[7] we submit that such action was fully justified in the circumstances outlined above. In *Harris* v. *United States*, 390 U.S. 234, police officers were lawfully in the defendant's car when they discovered an automobile registration card belonging to a robbery victim. This Court held that "[n]othing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances." *Id.* at 236. Here, similarly, the law enforcement officers had a right to be in a position to view the "seized" numbers.

The fact that the numbers did not disclose a violation of law without further investigation does not alter the situation. An automobile serial number does

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[6] In evaluating the extent of the interference with respondent's Fourth Amendment rights or expectation of privacy, it must be taken into account that the weapons were stolen. See *Davis* v. *United States*, 328 U.S. 582, 590–591. This factor casts doubt upon his standing to object to their "seizure."

[7] In support of this conclusion, the court of appeals relied solely upon *United States* v. *Sokolow*, 450 F. 2d 324 (C.A. 5). In that case, officers arrested the defendant in his driveway on

not, on inspection, disclose whether a crime has been committed, yet it has been recognized that copying down an automobile's serial number when a police officer has a legitimate ground for the belief that such action is appropriate does not violate the Fourth Amendment. *United States* v. *Powers,* 439 F.2d 373 (C.A. 4), certiorari denied, 402 U.S. 1011. Indeed, several courts have held that the Fourth Amendment simply does not apply to such inspections. *United States* v. *Johnson,* 431 F.2d 441 (C.A. 5, *en banc*); *Cotton* v. *United States,* 371 F.2d 385, 393–394 (C.A. 9); *United States* v. *Graham,* 391 F.2d 439, 442–443 (C.A. 6), certiorari denied, 393 U.S. 941.

2. If, despite our contentions, this Court should conclude that there was an unreasonable search and seizure in violation of the Fourth Amendment, there is presented the further question whether the exclusionary rule should be automatically applied to bar use of the evidence.

We have explained in our brief in *United States* v. *Robinson,* No. 72–936, argued October 9, 1973 (at pages 37–45), the reasons why the exclusionary rule should not automatically be applied to every Fourth Amendment violation.[8] When, as here, reasonably

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charges of possession of stolen cigarettes. While arresting the defendant, the officers noticed a number of air conditioners stacked in the garage. They entered the garage and copied the serial numbers. The court in *Sokolow* held that the search and seizure was invalid, concluding that "[u]nder these circumstances, a warrant should have been sought." *Id.* at 325. It emphasized that there was no justification for the officers to enter the garage. Here, by contrast, the police officers were conducting a warrant-authorized search when they found the rifles.

[8] We are sending respondent a copy of our brief in *Robinson.*

motivated searches involve no flagrant, willful, or substantial violations of the Fourth Amendment, we believe there should be some flexibility and discretion for a court to determine whether the interests of justice call for exclusion of probative evidence. Like the thorough protective search incident to an arrest which was involved in *Robinson,* the careful scrutiny of deadly weapons found in the possession of those being investigated for violations of law is unlikely to be deterred by the suppression of evidence obtained in such circumstances. Therefore, and for the other reasons discussed in our *Robinson* brief, we believe that it was not appropriate to suppress the rifles in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1973.

APPENDIX A

No. 73-1168

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DERL GRAY, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed August 7, 1973

Before: McCREE and MILLER, Circuit Judges, and NEESE,* District Judge.

MILLER, Circuit Judge. The defendant, Derl Gray, appeals his convictions under a two count indictment charging violations of the federal firearms laws, 18 U.S.C. §§ 972(h)(1) and 922(j). Gray was found guilty under both counts by a jury and subsequently sentenced to concurrent three year terms of imprisonment.

The events preceding the defendant's federal convictions began with the actions of state law enforcement officers. In July 1972, Kentucky State Trooper, John R. Miller, received information that the defendant, the operator of a small grocery store in rural Fayette

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*The Honorable Charles G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

County, Kentucky,[1] was selling beer without a license. In response to this information, Trooper Miller requested Trooper Brodt to attempt to set up a sale. Accordingly, on Sunday, July 16, 1972, Trooper Brodt, in plain clothes, went to the defendant's store and purchased five cans of beer. He then left the store to procure a search warrant and a warrant for Gray's arrest. After obtaining the two warrants, Troopers Miller and Brodt returned to the defendant's store to arrest Gray and execute the search warrant which directed the seizure of "any intoxicating liquors, apparatus for manufacturing intoxicating liquors or materials used in the manufacture of intoxicating liquors."

The defendant was immediately arrested in the store area of the building and the property was searched. After locating and seizing a small quantity of beer in a cooler in the store, Trooper Brodt then proceeded to the upper level of the building to search while Trooper Miller remained on the lower level with the defendant. No alcoholic beverages were found in the upper residence area, but while Trooper Brodt was conducting his search he noticed two rifles leaning against the wall in an upstairs clothes closet. The officer removed the rifles from the closet and took them downstairs to the store area of the building where he copied down the serial numbers of the weapons. Trooper Brodt then returnd the weapons to the upstairs closet.[2] After searching the outbuilding and the motor vehicles

[1] The defendant leased a two-story combination store and dwellhouse. The lower level was used by Gray for commercial purposes and the second story was the defendant's residence.

[2] Upon returning the rifles to the closet, Trooper Brodt discovered a shotgun, which subsequently was determined to be stolen. This weapon, however, is not involved in this appeal.

on the property and seizing several cases of beer the officers departed with the defendant.[3]

The officers then ran the serial numbers obtained from the rifles through the computer of the National Crime Information Center and learned for the first time that the firearms had been stolen in Tennessee on June 11, 1972.[4] Trooper Brodt then filed affidavits to obtain a search warrant for the seizure of the rifles and a warrant for Gray's arrest for knowingly receiving stolen property. On the evening of the same day the two officers returned to the defendant's store to execute the second search warrant and to arrest Gray. The defendant was arrested but the officers were unable to locate the rifles[5] until the officers indicated that unless Gray turned over the rifles they were going to arrest his common law wife. Gray then took the officers to two locations and retrieved the rifles.

The defendant raises several issues on this appeal but upon oral argument of this case the question arose as to the propriety and effect of Trooper Brodt's actions in removing the rifles from the closet, examining them, and copying down the serial numbers pursuant to a warrant directing the seizure of alcoholic beverages. This question has now been briefed by the

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[3] Following the defendant's arrest he was immediately released on bail.

[4] The time lapse between the taking of the serial numbers from the rifles during the first search and receiving the information from the National Firearms Center that the weapons were stolen was approximately three hours.

[5] The defendant's testimony at the suppression hearing in district court indicates that the officers did not conduct a second search but rather demanded that Gray give them the weapons. The return on the search warrant signed by Trooper Brodt, however, states "Did not find guns in search." No testimony by the officers on this point appears in the record.

parties and because we decide the case on the basis of this issue, we deem it unnecessary to discuss others.

The starting point of our analysis is the fourth amendment of the Federal Constitution which commands that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.[6]

We are concerned in this case with a search carried out pursuant to a search warrant and it is in that context that we examine the plain view doctrine which under certain circumstances allows the police to seize objects not specified in the warrant.

The fourth amendment requires that warrants particularly describe the things to be seized. The specificity of description requirement furthers the goal of privacy which the fourth amendment was designed to protect by insuring that even when a search is carried out pursuant to a warrant, the search is limited in scope so as not to be general or exploratory. As the Supreme Court stated in *Marron* v. *United States,* 275 U.S. 192, 196 (1927):

> The requirement that warrants shall particularly describe the things to be seized makes

[6] It appears that a judge of the Fayette County quarterly court held the warrants to be invalid with respect to the seizure of the beer and weapons. The reason for this ruling does not appear from the record. In any event, in view of the broad language in *Elkins* v. *United States*, 364 U.S. 206, 223–224 (1960) we feel bound to make an independent inquiry, applying federal law on the fourth amendment question.

> general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

This statement from *Marron* fails, however, to recognize the plain view doctrine which is now well established in the law of search and seizure. *See Harris* v. *United States,* 390 U.S. 234 (1968); *Ker* v. *California,* 374 U.S. 23 (1963); *United States* v. *Lee,* 274 U.S. 559 (1927). The doctrine was fully explained by Mr. Justice Stewart in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971). As there stated:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of *evidence incriminating the accused.* The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is *immediately apparent to the police that they have evidence before them;* the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. 403 U.S. at 466 [Emphasis added].[7]

[7] The Court is cognizant of the fact that Part II C of Mr. Justice Stewart's opinion in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971) was only concurred in by three other justices. This Court has, however, explicitly accepted the full reasoning of Mr. Justice Stewart's opinion concerning the plain view doctrine in *Lewis* v. *Cardwell,* 476 F. 2d 467 (6th Cir. 1973)

When the facts of this case are analyzed under the plain view doctrine, the seizure of the rifles by Trooper Brodt cannot be justified. The first prong of the doctrine requires that "the police officer . . . had a prior justification for an intrusion." This requirement was met in the present case since the officers were acting pursuant to a legitimate search warrant directing the seizure of alcoholic beverages upon the defendant's property. The second prong of the doctrine requires that during the search the officers "came inadvertently across a piece of evidence incriminating the accused." Further, "the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them." Here, Officer Brodt inadvertently discovered the rifles in the upstairs clothes closet while searching for alcoholic beverages but it was not "immediately apparent" that the rifles were "evidence incriminating the accused." The rifles were not contraband; there was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers at that time have any knowledge that the rifles were evidence of any other crimes. It was only after Trooper Brodt had seized the weapons, copied down the serial numbers, left the defendant's premises, and then run the information taken off the rifles through the National Crime Information Center that he learned that they were stolen and hence incriminating. This can hardly be characterized as being "immediately apparent." To allow the police to seize objects, unincriminating at the time of seizure, would not in our view comport with the plain view doctrine.

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and *Cook* v. *Johnson*, 459 F. 2d 473 (6th Cir. 1972). We have also implicitly accepted that reasoning in *United States* v. *Gargotto*, ——— F. 2d ——— (6th Cir. 1973).

In the context of a search pursuant to a warrant, the doctrine is a recognition of the fact that when the police come across immediately recognizable incriminating evidence not named in the warrant they should not be required to close their eyes to it, regardless of whether it is evidence of the crime they are investigating or evidence of some other crime. The doctrine is also a recognition of the fact that it would be a needless inconvenience to require the police to obtain another warrant. However, it must be "immediately apparent" to the police that the object is in fact incriminating or the seizure of the object would be without probable cause and would turn the search into a general or exploratory one. As stated by Mr. Justice Stewart in *Coolidge* v. *New Hampshire, supra,* at 466: "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." This is precisely what occurred in this case since the rifles obviously were not receptacles of alcoholic beverages nor were they contraband and the officers' original observation of the weapons was nothing more than a general rummaging. Since the rifles were not incriminating evidence at the time Trooper Brodt removed them from the closet and copied down the serial numbers, this police action cannot be sanctioned under the plain view doctrine. *See Stanley* v. *Georgia,* 394 U.S. 557 (1969) (Stewart, J., concurring opinion).

The government argues that Trooper Brodt's actions were not a search or a seizure. Whether or not the officer's actions constituted a technical search, they clearly were a seizure. Officer Brodt, to be sure, could not help noticing the rifles in the closet as he had every right to do. But he did not simply see or observe the presence of the rifles (which as we have indicated were

not contraband nor recognized by the officer to be such). Instead he removed them from the closet, carried them to the lower floor of the building and then copied down the serial numbers. The fact that he did not take the rifles with him after conducting the search does not make his actions any less a seizure. Removing the rifles from the closet was a seizure as was the copying down of the serial numbers. *See United States* v. *Sokolow,* 450 F.2d 324 (5th Cir. 1971).[8] Since seizures, like searches, cannot be undertaken by the police without probable cause, whether with or without a warrant, Trooper Brodt's actions were performed without the sanction of this constitutionally mandated requirement. Therefore, the rifles should have been suppressed since the second warrant was impermissively tainted by Officer Brodt's initial seizure of the weapons. *Wong Sun* v. *United States,* 371 U.S. 471 (1963).[9]

Reversed and remanded for proceedings not inconsistent with this opinion.

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[8] In *United States* v. *Sokolow*, 450 F.2d 324, 326 (5th Cir. 1971) a police officer entered the defendant's garage and copied down the serial numbers of air conditioners stacked there. The court characterized the police actions as "Seizures of the serial numbers."

[9] Since the defendant turned the rifles over to the officers only after the officers threatened to arrest the defendant's wife, no plausible argument can be made that Gray "voluntarily" gave the officers the weapons.

APPENDIX B

No. 73-1168

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DERL GRAY, A/K/A DERRELL GRAY, DEFENDANT-APPELLANT

Filed August 7, 1973, James A. Higgins, Clerk

Before: McCREE and MILLER, Circuit Judges, and NEESE, District Judge.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Kentucky.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for further proceedings.

No costs taxed.

Entered by Order of the Court:

JAMES A. HIGGINS, *Clerk.*

Attest—A True Copy:

JAMES A. HIGGINS, *Clerk.*

APPENDIX C

No. 73-1168

United States Court of Appeals for the Sixth Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DERL GRAY, DEFENDANT-APPELLANT

Filed September 18, 1973, James A. Higgins, Clerk

ORDER

Before: McCREE and MILLER, Circuit Judges, and NEESE,* District Judge.

In this action the plaintiff-appellee has filed a petition for rehearing.

After a careful reconsideration of the entire record, the Court is of the opinion that the petition is without merit.

It is therefore ordered and adjudged that the petition to rehear be and it is hereby denied.

Entered by Order of the Court:

JAMES A. HIGGINS, *Clerk*.

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*The Honorable Charles G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

U.S. GOVERNMENT PRINTING OFFICE: 1973

LIBRARY
SUPREME COURT, U. S.

No. 73-796

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

UNITED STATES OF AMERICA - - - *Petitioner*

V.

DERL GRAY, - - - - - - - - - - - Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-796

UNITED STATES OF AMERICA, - - *Petitioner*

V.

DERL GRAY, - - - - - - - - - - *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The respondent respectfully requests that the petition of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit be denied.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has now been reported at 484 F. 2d 352 (6th Cir. 1973).

QUESTIONS PRESENTED

The respondent for the reasons stated hereinafter, is not satisfied with the statement of the questions

presented by the petitioner and therefore submits the following counterstatement of the questions presented:

I. Whether an affidavit is sufficient to support the issuance of a search warrant in respect to the "description of the premises to be searched" when that affidavit: (a) omits any mention of the county or state where the property is located, (b) places the property in the wrong quadrant of an intersection of two highways in a rural area not within any incorporated city, and (c) does not recite that said premises are in the possession of anyone, even "John Doe".

The Court of Appeals did not answer this question.

Respondent contends that this question should have been answered, "No."

II. Whether, assuming state troopers were legitimately in one's home pursuant to a search warrant for the seizure of alcoholic beverages and the officers observed two rifles in the back of a closet, but did not have probable cause to believe the rifles were evidence of a crime and could not have obtained a warrant for their seizure, the "plain view" doctrine permits those officers to pull out, examine, copy the serial numbers, run the serial numbers through the NCIC computer, and then obtain a warrant for the seizure of the rifles from the information obtained from the computer.

The Court of Appeals answered this question, "No."

The Respondent submits that the Court of Appeals answered this question correctly.

III. Whether the rule excluding from evidence items seized in one's home in violation of the Fourth

Amendment to the Constitution of the United States should be abolished.

The Court of Appeals did not answer this question in the above form, but did apply the exclusionary rule.

Respondent submits that this question should be answered, "No."

Issue I above has been added by the respondent because the petitioner has misinterpreted the decision of the Court of Appeals for the Sixth Circuit. On pages 3A-4A of the petitioner's appendix A, the opinion of the Court below, that Court stated:

> The defendant raises several issues on this appeal but upon oral argument of this case the question arose as to the propriety and effect of Trooper Brodt's actions in removing the rifles from the closet, examining them, and copying down the serial numbers pursuant to a warrant directing the seizure of alcoholic beverages. This question has now been briefed by the parties and *because we decide the case on the basis of this issue, we deem it unnecessary to discuss others.* (Emphasis added).

The Court of Appeals did not determine Issue I, it merely assumed the officers were on the premises legitimately for purposes of an analysis of the facts under the "plain view" doctrine. Correctly or incorrectly deeming a decision necessary or unnecessary is not making a decision.

Issue II is a more accurate statement of the issue in fact decided by the Court of Appeals than is question 1 presented by the petitioner.

Issue III as stated above makes the impact of what the petitioner states as question 2 more clear and removes the disguise furnished by the petitioner.

STATEMENT

With the exception of the affidavit used to obtain the original alcoholic beverage warrant, printed in the Appendix to this brief, the facts as stated by the United States Court of Appeals for the Sixth Circuit in its opinion below are fair and accurate. Respondent feels, however, impelled to restate some of the facts as presented by the petitioner in its statement.

State Trooper John Miller was not a resident of the local community, he was "more known" than Trooper Brodt in the community. (Tr. 52).

The premises in question were a combination store and dwelling house. The lower floor was being used as a store and the upper floor was being used as the living quarters of Mr. Gray, his common law wife, Mary Head, and Ms. Head's two children. (Tr. 13).

The search of the second floor living quarters and all of the matters pertaining to the rifles were carried out by the young, inexperienced Trooper Brodt, not Trooper Miller. (Tr. 16 and 17).

The rifles were in fact obtained by the troopers after Brodt threatened, without any basis, to charge a loved one of Mr. Gray with a serious crime unless they were given the rifles. (Tr. 36, 37 and 38).

ARGUMENT

I. RE SUFFICIENCY OF AFFIDAVIT.

This court will recall that there were two search warrants issued for the respondent's premises. The sufficiency of the affidavit (App. to this Brief) to

support the issuance of the first warrant is what the respondent is questioning. That first warrant was issued to enable the Kentucky State Police to search for and seize beer and other alcoholic beverages belived to be in the possession of the respondent for illegal purposes. Discovery of the two rifles, which are the subject of the case at bar, was made by a state officer, a Kentucky State Trooper, while executing this alcoholic beverage warrant. The second warrant was issued because of the knowledge acquired by the trooper during the first search, i.e., the probable cause necessary to obtain the second warrant resulted from the first search. "Of course, the discoveries of an illegal search cannot be used to validate the probable cause judgment upon which the search depends." *Whiteley v. Warden*, 401 U.S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 (1971).

The question involved does not seem to be a question strictly of a violation of the respondent's Fourth and Fourteenth Amendment rights under the Constitution of the United States, since the search and seizure was performed by state officers and the trial took place in federal court on federal charges. The test is one of federal law derived from the Constitution, the statutes, and the principles of the common law, with an independent inquiry being made by the federal court. However, evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the respondent's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the respondent's timely objection in a federal criminal trial. *Elkins v. United States*, 364 U.S. 206, 4 L. Ed. 2d

1669, 80 S. Ct. 1437 (1960), and *United States v. Clarke*, 451 F. 2d 584 ((5th Cir. 1971). Thus, the Fourth Amendment states the test to be applied, even though it does not by itself technically provide the reason such evidence is inadmissible.

The pertinent portion of the Fourth Amendment to the Constitution of the United States reads as follows:

> . . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched,* and the persons or things to be seized. (Emphasis added).

In the case at bar, the affidavit: (a) omitted any mention of the county or state where the property is located, (b) placed the property in the wrong quadrant of an intersection of two highways in a rural area not within any incorporated city, and (c) failed to mention that the premises were in the possession of anyone.

The rule that should be applied was very well stated by the Kentucky Court of Appeals, when it held:

> . . . An affidavit to be sufficient to support the issuance of a search warrant must recite facts in respect to the description of the property to be searched to enable the officer serving the warrant to locate the property with certainty, and also to enable the Magistrate issuing the warrant to determine that the property to be searched is within his jurisdiction. *Pigg v. Commonwealth*, 299 S.W. 2d 796 (1957), and *Baker v. Commonwealth*, 223 S.W. 2d 590 (1949).

This Kentucky rule seems to be within the arena of reasonableness that encompasses so much of the law.

This Court will notice that the *Kentucky* rule has two distinct degrees of specificity, each of which is very reasonable: (1) *Specific enough* to permit the officer serving the warrant to locate the property with certainty, and (2) *General enough* to enable the magistrate to determine that the property is within his jurisdiction.

In the case at bar, the magistrate had absolutely no way to know from reading the affidavit that the respondent's premises were within the area over which he had jurisdiction, i.e., Fayette County, Kentucky. In fact, the premises are nearly in Woodford County. The affidavit just does not meet degree No. 2 above. Furthermore, with the quadrant of the intersection wrong, an officer attempting to serve the warrant, who had never been to the premises, quite likely would question whether it met degree No. 1 above. The *Baker* case is particularly in point.

Though the "description" question is the gist of defendant's contention on this issue, this Court should also note a number of other weaknesses in this matter. First, the trooper enticed the defendant into a local liquor law violation; second, the affidavit requested a warrant to search only the store portion of the premises and the troopers extended the search into the dwelling portion of the premises; third, the Commonwealth of Kentucky, which pays the salaries of these officers, is, in effect, being denied the right to control their actions, and fourth, the Fayette Quarterly Court has already suppressed this evidence after finding the affidavit defective.

The District Court, in overruling defendant's various motions to suppress this evidence, relied on *United States v. Combs*, 468 F. 2d 1390 (6th Cir. 1972)

and *United States v. Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S Ct. 741 (1965). Both *Combs* and *Ventresca* seem to hold that in testing an affidavit as to the "probable cause" requirement, the Court should test same in a commonsense or reasonable manner, as opposed to a hypertechnical manner. The *Kentucky* rule has always been reasonable on the "description" issue. Defendant submits that "reasonable", "realistic", "commonsense" do not mean that the Fourth Amendment has been repealed or that there are no standards or minimum requirements for testing affidavits. It appears impossible to set standards low enough for the affidavit in the case at bar to receive a passing grade.

Thus, respondent submits that it is not at all clear that the troopers had any right at all to be on respondent's premises.

II. RE "PLAIN VIEW" DOCTRINE.

The seizure of the serial numbers from the rifles took place while the officers were acting pursuant to a search warrant to seize alcoholic beverages in a man's home. It is in this context that the "plain view" doctrine was applied by the Court of Appeals.

The applicable principle was stated by this Court in *Coolidge v. New Hampshire*, 403 U.S. 443 at 466, 29 L. Ed. 2d 564 at 583, 91 S. Ct. 2022 (1971), in discussing the "plain view" doctrine:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification

> whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused — and permits the warrantless seizure. *Of course, the extension of the original justification is legitimate only where it is "immediately apparent" to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.* (Emphasis added).

This Court in *Coolidge* cited the concurring opinion of Mr. Justice Stewart, Mr. Justice Brennan and Mr. Justice White, in *Stanley v. Georgia*, 394 U. S. 557, 22 L. Ed. 2d 542, 89 S. Ct. 1243 (1969). In *Stanley*, the defendant's home was searched under a warrant for the seizure of equipment, etc., used in an illegal wagering business. During the course of the search, the officers found some films in a drawer of the defendant's desk. The officers decided to view the films and after viewing the films for several minutes decided to arrest the defendant for possession of obscene material. Mr. Justice Stewart at Page 572 stated:

> To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant.

The viewing of a film by the officers in *Stanley* to determine if a crime was being committed seems perfectly analogous to running the serial numbers of

the rifles through the National Crime Information Center computer in the case at bar.

Thus, respondent submits that the Court of Appeals properly found that the "plain view" doctrine did not permit this search and seizure. To hold otherwise will legitimize the old "general" or "blanket" warrant that the Fourth Amendment was specifically designed to prohibit.

In the *Cady, Terry, Adams, Harris, Powers, Johnson, Cotton,* and *Graham* cases cited by the petitioner herein, the police were performing a legitimate function or had a legitimate reason for very limited searches which inadvertently produced incriminating evidence. In none of those cases were the police acting under a search warrant. In the case at bar, the young state trooper was not content to charge Mr. Gray with alcoholic beverage misdemeanors, he had to find something else. If the rifles had not been available, he would have no doubt taken the serial numbers off of Mr. Gray's stove, refrigerator and television.

Respondent therefore submits that this is not a proper case to grant certiorari upon the issues as construed by petitioner.

III. RE ABOLITION OF THE EXCLUSIONARY RULE.

The brief submitted by petitioner in *United States v. Robinson,* No. 72-936, cited in support of this issue does not adequately justify the social consequences that will result from abolition of the exclusionary rule.

In addition to being the only deterrent to lawless law enforcement, the exclusionary rule represents the

respect for the law that must be demonstrated by those who would enforce the law against others.

If the police and the courts do not demonstrate their respect for the law, how can we expect the American public to obey the law. The petitioner is requesting permission to violate the law, "just a little." With the present state of turmoil and division that exists in our country today, because certain of our leaders chose to violate the law, "just a little" and felt the "ends justified the means," the request of the petitioner appears untimely, if not ludicrous.

If the burden of proving that a violation of the Fourth Amendment was flagrant, willful, or substantial is placed upon a defendant, every competent defense attorney will be required to mount a personal attack against the policeman, rather than settling for a technical violation and closing the file.

Further, the modification of the rule as suggested by the petitioner will be too tempting for the police to resist. Every doubt will be resolved in favor of another intrusion on our liberty. The businessman is the one with something to lose. The pot-smoking youth of today will soon solve their problems with a voted appeal of the marijuana laws. The rest of us are going to have to live with such a mistake.

CONCLUSION

For the foregoing reasons and because the petitioner has failed to adequately demonstrate any reason under Rule 19 for grant of certiorari, the respondent prays this Court to deny the writ of certiorari.

Respectfully submitted,

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I hereby certify that three (3) copies of the foregoing Brief were served on the United States of America, by mailing same, air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, this the 12th day of December, 1973.

James A. Shuffett
Attorney for Respondent

APPENDIX

Affidavit for search warrant by Ed Brodt, Trooper Kentucky State Police.

Affiant Edward Brodt so states that on the 16th of July 1972 at 1:30 P. M he did buy or purchase 5 cans of Pabst Blue Beer at a cost of $.50 per can. This purchase was made at a combination store and dwelling house located at the junction of U. S. 421 and Yarnallton Road, situated on the west side of U. S. 421 and the north side of Yarnalltown Rd. Said property has parking area and gas pump in front of building. Affiant further states that he believes that this store is engaged in the illegal sale of alcoholic beverages and that there is reason to believe that it stored upon the premises additional alcoholic beverages, to-wit beer, whiskey, gin, ale or wine.

/s/ Ed Brodt

Subscribed and sworn to before me by Ed Brodt this 16th day of July 1972.

/s/ A. Norrie Wake
Judge, Fayette Quarterly Court